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IN THE

Supreme Court of The United States

October Term, 1967

No. 639

MRS. MINNIE BRADE GLONA,

Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET. AL.,

On Writ of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PETITIONER

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IN THE
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ON WRIT OF CERTIORARI
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BRIEF FOR PETITIONER

OPINIONS BELOW

Fifth Circuit

The opinion of the court below in this case is reported at 379 F.2d 545, and is set out at *App.* 15.

The District Court

The District Court wrote no opinion. Its judgment dated June 24, 1966 is found at *App.* 10; it was not reported.

JURISDICTION

The Fifth Circuit Court of Appeals rendered its opinion and judgment on June 22, 1967, which was issued as mandate on July 17. Petition for certiorari was filed September 20, 1967 and certiorari was granted December 4, 1967. *App.* 20. Jurisdiction of this Court is conferred under the provisions of 28 U.S.C. 1254(1).

THE QUESTION PRESENTED

Whether the application and construction of Louisiana Civil Code, Article 2315, which grants parents the right to recover damages for wrongful death of legitimate children but denies recovery for wrongful death of illegitimate children is invalid under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana Civil Code, Article 2315 Provides As Follows:

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited

by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' "brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

STATEMENT OF THE CASE

Mrs. Minnie Brade Glona brought this action for damages for the wrongful death of her illegitimate, minor child, against the insurer of the alleged tortfeasor and the alleged tortfeasor.

Petitioner was a Texas domicillary at the time of the death of her son and at the time suit was brought.

The jurisdiction of the United States District Court was based on diversity of citizenship, Article III, Section 2, U. S. Constitution, and Title 28, U. S. Code Section 1332.

The claim arose out of an automobile collision in New Orleans, Louisiana and the son of petitioner died in Harahan, Louisiana.

The decedent was never adopted or legitimated by petitioner; he was, however, informally acknowledged by his mother, petitioner. Decedent never married and had no children whatsoever.

The district court granted summary judgment for the defendants, on the predicate that mothers may not recover for wrongful death of their illegitimate children in Louisiana under the jurisprudence of that State.

The Court of Appeals, in a per curiam decision, affirmed the judgment of the district court on June 22, 1967.

ARGUMENT

I.

THE DENIAL OF THE RIGHT TO RECOVER FOR DAMAGES FOR WRONGFUL DEATH TO MOTHERS OF ILLEGITIMATES IS A DENIAL OF EQUAL PROTECTION OF THE LAWS

"[I]nequalities arbitrarily created arouse the sense of injustice, because equal treatment of those similarly situated with respect to the issue before the court is a deep implicit expectation of the legal order." Edmond Cahn, THE SENSE OF INJUSTICE, 14.

A. INTRODUCTION — LOUISIANA APPROACH

Petitioner claims that she falls into the second classification of the survivorship portion of Louisiana's wrongful death statute, namely, "the surviving mother of the deceased". Billy Glona died, a minor, having

never married and leaving no children. *App.* 5. There is no gainsaying the fact that Mrs. Glona is the "mother" of Billy Glona, but because Louisiana courts have applied Article 2315 of the Civil Code in such a way as to deny to mothers of illegitimates the protection and benefits of the wrongful death statute, *Lynch v. Knoop*, 118 La. 611, 43 So. 252 (1907), the District Court and Fifth Circuit denied petitioner the right to recover for her son's death.

Article 2315 provides for the right of recovery for wrongful death in favor of "the surviving *father* and *mother* of the deceased, or either of them." The statute does not state 'legitimate' father or 'legitimate' mother. It has only been in the application of the statute by the Louisiana courts that the right to recovery has been so restricted.[1] Petitioner contends that the Louisiana courts have by their strained construction applied Article 2315 so as to deny her the equal protection of law guaranteed to her under the Fourteenth Amendment.

Within the framework of the legal system of Louisiana, the authorities are to be found, in order of rank,

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[1]The construction by Louisiana courts has been applied to children also. *Sesostris Youchican v. Texas & P. Ry. Co.*, 147 La. 1080, 86 So. 551(1920) denied an illegitimate Indian child the right to recover for his mother's death even though his parents were married according to tribal (but not Louisiana) ritual. See also *Levy v. State*, 192 So. 2d 193 (La. App. 4, 1966) cert. den. 250 La. 25, 193 So.2d 530(1967), *App.Pen.*, U.S.S.Ct. No. 508, ——— U. S. ———, 88 S.Ct. 290(1967). See generally: Note, *Rights of Children to an Action for Wrongful Death under Article 2315*, 14 Tul. L. Rev. 612(1940).

firstly in the statute itself, secondly in the doctrinal writings, only then in prior jurisprudence.[2]

> "The civilian does not regard the judicial interpretations of a statute as becoming part of the statute, so that the statute *as interpreted* is the law. He regards the statute alone as being the law, and prior decisions do not 'insulate' him in Professor Morrow's happy phrasing, (footnote omitted) from going directly to the statute for its meaning. In ideal theory, the civilian judge decides cases primarily 'not by reference to other decisions, but by reference to legislative texts and within limits of such judicial discretion as the legislative texts grant.' " Tate, *Techniques of Judicial Interpretation in Louisiana,* 22 La.L. Rev. 709, 744 (1962).

The willingness of this Court to overturn its own as well as State-established jurisprudential fiat which evolving social doctrine has discredited finds support in Louisiana's Civil Law System and the like ones derived from the European continent and the Roman Law.

> "We (in Louisiana) have never adopted *stare decisis,* and whatever chances it had of creeping into our system have been reduced to the

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[2]Ireland, *The Use of Decisions by United States Students of Civil Law.* 8 Tul.L. Rev. 358, 360(1934); Daggett, Dainow, Hebert, McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of La.* 12 Tul.L. Rev. 12 (1937).

> vanishing point by the passage of time. Our courts have always followed, and show every disposition to continue to follow, the essential civilian judicial technique of never letting today become either the slave of yesterday or the tyrant of tomorrow." Tucker, *The Code and the Common Law in Louisiana,* 29 Tul. L. Rev. 739, 759 (1955).

The history of constricted interpretation placed on Article 2315 has received the criticism of Louisiana commentators[3] and is not in accord with the civilian theories of interpretation nor with the interpretation given the source statute in the Code Napoleon[4] and is contrary to "natural law, reason or received usage", *La. Civ. Code,* Art. 21, which latter concepts should include a concept of equal protection.

> "The distinction of laws into odious laws and laws entitled to favor, with a view of narrowing or extending their construction, cannot be made by those whose duty it is to interpret them." *La. Code,* Art. 20.

The entire tort doctrine of Louisiana was, and is, summed up in Article 2315:

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[3]E. g.: *Op. Cit.,* 14 Tul. L.R. 612 (1940) Supra note 1; Stone, *Tort Doctrine in Louisiana: The Concept of Fault,* 27 Tul. L. Rev. 1 (1952); Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law and in Louisiana,* 6 Tul. L. Rev. 201 (1931); Oppenheim, *The Survival of Tort Actions,* 16 Tul. L. Rev. 386, 412 (1942).

[4]Voss. *Op. Cit., supra.*

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Probably due to common law influences, Louisiana courts did not originally follow the French interpretation of Article 2315 (*Code Napoleon*, Art. 1372) so as to allow for wrongful death actions. *Hubgh v. N.O. & C. RR.*, 6 La. Ann. 495, 54 Am. Dec. 155 (1851). But following this case and Lord Campbell's Act (Fatal Accidents Act)[5], Louisiana began its long series of amendments to Article 2315 so as to allow recovery for wrongful death. The original concept of Article 2315 was to compensate those *immediately* dependent on the deceased, i.e. wife and minor children (La. Act 223 of 1855) but later, under a broadening "concept of fault",[6] recovery was allowed to all heirs — the idea being that the wrongdoer should pay.[7]

Statutes providing for a cause of action for wrongful death are based either on a strict inheritance theory whereby recovery is allowed certain enumerated heirs, or on a compensatory theory allowing recovery

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[5]9 and 10 Vict. 1.c. 93 (1846). It is not true, as has been contended, that one could not recover for wrongful death in early common law prior to Lord Campbell's Act; it was accomplished through a criminal appeal instituted by a victim's heir or wife. 3 Blackstone's Commentaries (Lewis ed. 1922) 119; Voss, *op. cit.*, note 3 at p. 208.

[6]Article 2315 is to be used as a "mirror of the times" not only reflecting concepts of "moral blameworthiness" but also "concepts of economic utility and social good." Stone, *op. cit.*, note 3, p. 18.

[7]The history of the amendments is found in West's L.S.A. - Civil Code, Art. 2315.

to those who have suffered a loss by the death of a loved one from whom support is expected. The better view is the latter one.[8] However, if the former be the case, then petitioner is entitled to recover since Billy Glona left neither wife nor child and his natural mother may inherit, *La. Civ. Code*, Art. 922.

In spite of the fact that Louisiana Courts have held the claim for wrongful death to be a property right, *Buie v. Hester*, 147 So.2d 733 (La. App. 2-1962), mothers of illegitimates have yet been precluded from recovery. The interpretation rendered by Louisiana Courts and followed by the Fifth Circuit below bespeaks discrimination of the rankest sort. No consideration is given to the question of dependence, support or even purpose. Petitioner is no less a mother because her child was illegitimate. Under Louisiana law, petitioner had all the obligations attendant on being a mother, *La. Civ. Code*, Articles 239, 240, 243 and 245.

Nowhere in Article 2315 is there a restricting definition of "mother". Articles 27 and 178 of the Civil Code do differentiate between "legitimate" and "illegitimate" children but not "parents" and Article 2315 doesn't even purport to so distinguish.

The obvious conclusion is that the Louisiana Courts have constructed classifications within Article 2315

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[8] Oppenheim, *Op. Cit.*, note 3, p. 429; Preamble to Lord Campbell's Act, *supra*, note 5; Comment, *Illegitimate children as Beneficiaries under Wrongful Death Acts*, 30 Yale L. J. 167, 168 (1920); Speiser, *Recovery for Wrongful Death*, iii, 12 (1966).

which are "constitutionally irrelevant"[9] and, therefore, unrecognizable.

B. ILLEGITIMACY — AN INHERENTLY SUSPECT CLASSIFICATION

This court has taken two approaches to equal protection; the first considers the classification itself. Some classifications are inherently unjustifiable, e.g. those based on race, creed or color. The classification made by Louisiana Courts in this type of case is one based on status or nativity. Petitioner submits that this type of classification is likewise inherently suspect and respondents must, but cannot, show an overriding justification as being "necessary to the accomplishment of some permissible state objective." *Loving v. Va.*, 388 U.S. 1, 6, 87 S.Ct. 1817, 1823 (1967). Classifications based on race, creed or color are not the only "inherently suspect" classifications.

> "[C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact." *Hernandez v. Texas,* 347 U.S. 475, 478, 74 S.Ct. 667, 670 (1954).

This Court has held that classifications based on

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[9] "The mere state of being without funds is a neutral fact-constitutionally an irrelevance like race, creed or color." *Edwards v. Calif.*, 314 U.S. 160, 184, 62 S. Ct. 164, 172 (1941) concurring opinion.

nationality — Mexican in *Hernandez;* Chinese in *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064 (1886); the status of being a serviceman, *Carrington v. Rash,* 380 U.S. 89, 85 S. Ct. 775 (1965); ancestry, *Hirabayashi v. U.S.,* 320 U.S. 81, 63 S. Ct. 1385 (1943) —are inherently suspect. c.f. *Kotch v. Board of Comm'r.,* 330 U.S. 552, 565, 67 S.Ct. 910, 916 (1947), dissenting opinion.[10]

Such a law "bears a heavy burden of justification . . . and will be upheld only if it is *necessary* and not merely *rationally related*" to the state purpose. *McLaughlin v. Florida,* 379 U.S. 184, 196, 85 S. Ct. 283, 290 (1964). (Emphasis supplied.)

The classification here is just as arbitrary and capricious as any stricken down by the Court. Legitimacy is no index to dependency nor to any other legitimate purpose of the Louisiana wrongful death statute. We submit it is not even an index to morality. By "fencing out"[11] illegitimates, the Louisiana courts discriminate against petitioner solely because of her status.

C. *ILLEGITIMACY HAS NO RELATIONSHIP TO THE WRONGFUL DEATH STATUTE.*

The second approach to equal protection taken by the Court, and apropos here, is the consideration of the

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[10]Dissent challenges the constitutionality of a regulation "which makes admission to the ranks of pilots turn finally on consanguinity."

[11]*Carrington v. Rash,* 380 U.S. 89, 94, 85 S. Ct. 775, 779 (1965)

classification made as it may be rationally related to the purpose of the statute. It isn't even suggested that Article 2315 was confected for the purpose of controlling pre-marital sexual relations or for the purpose of prohibiting the conception and birth of children out of wedlock. The obvious purpose was, and is, to provide a remedy for pecuniary losses occurring by reason of death. *Supra* pp. 9-10

Under this second test, therefore, classification is reasonable if it treats alike all those similarly situated in reference to the purpose of the statute. Those similarly situated should be similarly treated. *Smith v. Cahoon*, 283 U.S. 553, 51 S.Ct. 582, (1931).

The statute exempting carriers of farm produce from furnishing financial responsibility in *Smith v. Cahoon* violated the equal protection clause, not because the classification was an inherently suspect one, but because special treatment could not be afforded in the context of a statute purporting to protect the public against negligent carriers. In the same vein, 2315 type statutes do not have as their purpose the regulation of morality.

Viewed functionally, therefore, there is absolutely no basis for a court-imposed classification depriving illegitimates and the families of illegitimates of the beneficence of Article 2315 while allowing it to legitimates.

Over 100 years after the Louisiana wrongful death statute was enacted, the Louisiana Court stated that

the purpose of "fencing out" illegitimates "is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock." *Levy v. State*, 192 So.2d 193, 195 (La. App. 4 - 1966). The absurdity of this statement or 'reason' has been pointed up by those who have studied the matter.[12] It is made even clearer by the fact that petitioner, Mrs. Glona, has always been a Texas domiciliary and Texas treats her and her deceased son as legitimates for purposes of its wrongful death statute. Title 17 - *Vernon's Texas Civil Stat.*, Art. 4675, *Galveston H. & S. A. Ry. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705, 706 (1907). It was only a fortuitous event that petitioner's child was killed in Louisiana rather than in Texas.[13] If Louisiana policy underlying Article 2315 is what its courts say it is, then it would certainly be inapplicable to petitioner. She could not possibly be considered to have indulged in her pre-marital intercourse with Louisiana law in mind. Thus, in *Chivers v. Couch Motor Lines, Inc.*, 159 So2d 544 (La. App. 3-1964) the Louisiana court allowed recovery for a Louisiana wrongful death by a Florida "com-

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[12]Foster & Freed, *Unequal Protection: Poverty and Family Law*, 42 Ind. L. J. 193, 220 (1967); Krauss, *Equal Protection for the Illegitimate*, 65 Mich. L.R. 477, 491 (1967); Krauss, *The Non-Marital Child — New Conceptions for the Law of Unlawfulness*, 1 Fam. Law Qtrly 1. (ABA-Je, 1967).

[13]This case further points up that the status and rights given to petitioner under her *lex domicilii* are taken away by Louisiana's *lex delicti*. cf. *Richards v. U.S.*, 369 U.S. 1, 82 S.Ct. 585 (1961); *Comment, Babcock v. Jackson* 63 Cal. L.R. 1219 (1963); Currie, *The Disinterested Third State*, 28 Law & Cont. Prob. 754 (1963); Currie, *Survival of Action: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. R. 205 (1958).

mon law" wife, belying any public policy of this state against recovery by illegitimate families.

The fact is that the reason enumerated by the *Levy* court is no reason at all. The real reason is simply pure prejudice based on tradition. Like segregation, tradition is not the constitutional answer, it is not evidence of a rationally valid classification but only of practice. Justice Holmes' statement that a given statute was "the outcome of a thousand years of history"[14] was used not to justify but explain the regulation which he would nevertheless have sustained on other grounds.

The present case fails to meet the purpose-classification test. This test was perhaps best explained by Justice Jackson:

> "As a matter of principle . . . I do not think that differences of treatment under law should be approved on classifications because of differences unrelated to legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those let free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance." *Rwy. Exp. v. N.Y.* 336

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[14] *Hoeper v. Tax Comm.*, 284 U.S. 206, 219, 52 S.Ct. 120, 123 (1931); Holmes, *The Common Law*, 73.

U.S. 106, 115, 69 S. Ct. 463, 468 (1949) concurring opinion.

The same functional approach has been followed by this Court in *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344 (1957) (relied upon only to cite it by the Fifth Circuit in the instant case), *App.* 17; and in *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, (1942) and *Gulf v. Ellis*, 165 U.S. 150, 17 S.Ct. 255 (1897).

Nor has the criteria in *Skinner* ever been considered by Louisiana Courts or by the Fifth Circuit. Certainly here, as in *Skinner*, all persons similarly situated are not brought within the law. *Skinner v. Oklahoma*, 316 U.S. at 541. See also Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Cal. L.R. 341, 353 (1949).

If "law reflects distinctions that exist in fact"[15] what difference can be made out for the treatment of mothers of legitimates *vis a vis* mothers of illegitimates? Article 2315 is not used to punish or discourage adulterous relations. In the ordinary sense a married woman who gives birth to a child not the result of a union with her husband — produces nonetheless an illegitimate child. But Louisiana again dwells on fictions and conclusively presumes the child to be legitimate as long as the mother is married. *La. Civ. Code* Arts. 27, 179 and 184. *Harris v. Illinois Cent. R. Co.*, 220 F. 2d 134 (CA 5 Cir. - 1955).

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[15]Frankfurter, J., *concurring* in *Morey v. Doud*, 354 U.S. at p. 472.

The reasons of the Louisiana Courts simply do not work. Louisiana has experienced growth in its illegitimacy rate and figures,[16] and the rate of growth of illegitimates is greater in Louisiana than the national growth rate.[17] The sum and substance is that Louisiana Courts have used a statute (Article 2315) having one set of purposes as a vehicle for achieving discrimination based on wholly different criteria. In other areas, Louisiana has been careful not to discriminate against illegitimates probably for fear of dubious legality. For example, the state makes no distinction between illegitimates and legitimates where incest is concerned. LSA-R.S. 14:78. Kill the mother of an illegitimate and one suffers the *criminal* consequence. Louisiana illegitimates and mothers of them inherit one from the other. *La. Civ. Code*, Arts. 918, 922. However, the State draws the line at that point and absolves the killer of an illegitimate from all civil liability to his mother. There is an open season on bastards.

Had the defendants in this case killed a cow belonging to Mrs. Glona, she could recover in Louisiana Courts[18] but not for the death of a child whom she gave birth to and nurtured an dsupported. Moneover, if Billy Glona owned a cow that was killed by defendants and he subsequently died, petitioner would inherit his claim for the loss of the cow. "The right to recover damages to property. . . is inherited by . . .

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[16]See appendix A, *infra*.

[17]*Ibid.*, In 1960 Louisiana had 91.5 illegitimate births per thousand live births and United States had 52.7. In 1964 Louisiana had 111.2 and the United States, 68.5.

[18]*Sturm v. Hutchinson*, 37 S.2d 45 (La. App. 1-1948)

irregular heirs." *La. Civ. Code*, Art. 2315. Natural mothers are irregular heirs. *Ibid.*, Art. 922.

The solution to this case is not charity but justice. No one can be so wanting in candor as to deny that the stigma and occurrence of illegitimacy affects primarily the poor,[19] which for both mother and child generates "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Ed.*, 347 U.S. 483, 494, 74 S. Ct. 686, 691 (1954).

And to make the poor poorer by denying them the right to recover for losses suffered by reason of the death of another is the denial of justice.[20]

Every jurisdiction of the United States in some manner allows illegitimates to inherit from their mother and vice versa. Note, *Illegitimacy*, 26 Brooklyn L. R. 45, 82 (1959), Ten states by statute, specifically authorize a mother of an illegitimate to recover for his wrongful death.[21] Other states have interpreted

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[19] See tenBroek *California's Dual System of Family Law*, 16 Stanf. L. R. 257 & 900 (1964); 17 Stanf. L. R. 614 (1965).

[20] "In an established and well ordered state rectificatory justice is equality before the law, civil and criminal" McKeon, R., *Justice and Equality* NOMOS VI (Prentice Hall-1963) 58.

[21] Arizona, Ariz. R. S. Ann. 12-612, 14-206; Georgia, Ga. Code 105-1307; Maryland, Md. Code Ann. Art. 67§4; Florida, FSA § 768.01-03 (1965); Mississippi, Miss. Stat. § 1453; So. Carolina; S.C.Stat. §10-1953; Tennessee, Tenn. Code Ann. §20-607(1965); Washington, R.C.W.A. §4.20.005; West Virginia, W.Va. Code §5474, 4084; Oregon, Ore. Rev. Stat. 30.010, 109.060.

their wrongful death statutes so as to allow it.[22] Louisiana is the only state that refuses, by its jurisprudence, to allow recovery. (Some states have not decided the question.)

Louisiana in the analagous situation of Workmen's Compensation allows a natural mother to recover for the death of her illegitimate child. LSA-R.S. 23:1231, 1252, 1253; *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1945); Note, *Workmen's Compensation, Illegitimate children*, 20 Tul. L.R. 145 (1945).

The *Thompson* court reasoned that if the legislature had considered it against public order to allow illegitimates recovery under the workmen's compensation statute, it would have expressly set it forth in the statute. The same reasoning should have and could have been applied to the wrongful death statute. There is no rhyme or reason for not doing so, but not to do so deprives the parent in the instant case of that which all other parents are entitled.

The invidious discrimination is further characterized by the fact that an employer of an illegitimate may recover by way of subrogation for compensation

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[22] E.g. *Sou. Ry. Co. v. Carlton*, 118 So. 458 (Ala. 1928), *Stoneburner v. Theodoratus*, 30 P.2d 1001 (Cal. App. 1934), 31 P.2d 1042 (1934); *Huddleston v. Henderson*, 181 Ill. App. 176 (1913); *Marshall v. Wabash Ry.*, 120 Mo. 275, 25 S.W. 179 (1894); *Porsberg v. Klien*, 39 Ohio L.A. 470, 53 N.E. 2nd 63 (1944); *Galveston v. Walker*, 48 Tex. Civ. App. 52, 106 S.W. 705, (1907); *Andrzcjewski v. Northwestern Fuel Co.*, 158 Wisc. 170, 148 N.W. 37 (1914). Some states refer to their laws on intestacy and as has been pointed out all states bring mothers of illegitimates within their intestacy provisions.

paid to his dependents against third party tort feasors even though the illegitimate family may not. In *Thomas v. Matthew Lumber Co.*, 201 S. 2d 357 (La. App. 2-1967) the employee was killed during the course of his employment. His employer paid compensation benefits to the decedent's common law wife (non-recognizable in Louisiana) and several illegitimate children. The court allowed the employer to recover against the tort feasor by way of subrogation although refusing the right to the illegitimate family. *Accord. Port of N.O. v. City*, 223 La. 199, 65 So. 2d 313 (1953).

Federal legislation in analagous fields has allowed illegitimate children in most instances to recover for the death of their natural parents[23] and where applicable there has been no denial of the right of natural parents to recover. The Jones Act, 46 U.S.C. 688, has been interpreted so as to allow even an aunt, who stood in *loco parentis* to a seaman, to recover.[24] It has been held repeatedly that illegitimate children recover under the Jones Act as well as the Death on the High Seas Act (46 U.S.C. 761). *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326, 330 (2 Cir. 1934), *cert. den.* 293 U.S. 579, 55 S.Ct. 89 (1934); *Civil v. Waterman*, 217 F. 2d 94 (1954); *Hassan v. A.M. Landry & Son, Inc.*, 321 F.2d 570 (5 Cir. 1963), *cert. den.*, 375 U.S. 967, 84 S.Ct.

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[23]Note, *The Rights of Illegitimates Under Federal Statutes*, 76 Harv. L. Rev. 337 (1962); Note, *Illegitimates: Definition of Children Under Federal Welfare Legislation*; 67 Col. L. Rev. 984 (1967); Comment, *The Illegitimates Right to Benefits Accruing Upon the Death of his Parents*, 28 La. L. Rev. 110 (1967).

[24]*In Re Panama Transp. Co.*, 98 F. S. 114 (D.C.N.Y. 1951), aff'd. 195 F. 2d 104.

486 (1963). The Federal Employer's Liability Act (45 U.S.C. 51) has repeatedly embraced illegitimates. *Huber v. Baltimore*, 241 F.S. 646 (D.Md. 1965); *Hammond v. Pa. R.R. Co.*, 31 N.J. 244, 156 A.2d 689 (1959); *Tune v. L & N RR. Co.*, 223 F.S. 928 (D.Tenn. 1963).

The Social Security Act, 42 U.S.C. 416(h) (2), (3); Veterans Legislation, 38 U.S.C. 101(4); and the Foreign Service Act, 22 U.S.C. 1064(3) all include illegitimates within their extending provisions. And the Federal Employee's Group Life Insurance Act (5 U.S.C. 2093) has been interpreted in such a way as to grant coverage to illegitimates even if the state law of intestacy did not recognize the illegitimate. *Metro Life Ins. Co. v. Thompson* 368 F.2d 791 (3 Cir. 1966). The approach has been to construe these types of statutes so as to accomplish the intended purpose, i.e. compensation for loss of expected support and love.

The overwhelming conclusion to be drawn is that Louisiana courts can find no "necessary relation", no "rational foundation", no "overriding purpose" independent of discrimination to justify the classification asserted. It is by these standards, however, that the classification must be measured and from the viewpoint that only recently in the history of this nation are the demands of the Constitution being applied to the poor from which group the largest portion of illegitimate families spring.

It may be argued that the "fencing out" of the mother is no more reasonable than the same treatment of the father and to allow recovery by the latter may

induce and encourage fraudulent claims in such number and difficulty as to unduly burden the Courts. But this addresses itself to the problem of proof only, and we are in accord that the burden of proof upon the male contender to illegitimate parenthood should be stringent. But we are not here faced with that problem, and the easily proven maternity should not bear the problems inherent in obverse situations.

Nor should this Court be unduly constricted by, nor solicitous of, the Louisiana courts rulings in construction of the underlying statute. This Court is here presented with a legal system whose fundamental tenet contravenes the continued adherence to a weak or erroneous statutory construction,[25] especially where that construction serves to give the protections and benefits of law to one class and deprive those protections to another based on no distinction in fact.

The import of the Louisiana approach to this problem is such as to deny to petitioner the factual status of being a "person". The Fourteenth Amendment refuses to allow such fictions to be used to deny equal protection of the law.

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[25] "Law is a solemn expression of legislative will." Art. 1, La. Civ. Code.

"The words of a law are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words." Art. 14, La. Civ. Code.

" 'child' :4a:a son or a daughter: a male or female descedent in the first degree: the immediate progeny of human parents." Webster's Third New International Dictionary (1961) p. 388.

" 'parent' 1a: one that begets or brings forth offspring: father, mother" *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals and the Federal District Court should be reversed.

Respectfully submitted,

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CERTIFICATE

A copy of the foregoing brief has been served on Mr. Frank Normann, Esq., Normann and Normann, attorney for respondents, 1605 Hibernia National Bank Bldg., New Orleans, Louisiana, 70112, by mailing same to him postage prepaid this _____ day of January, 1968.

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APPENDIX A

Table of Total Live Birth and Total Illegitimate Births United States[1] and Louisiana[2]

	LIVE BIRTHS		ILLEGITIMATE BIRTHS			
			United States		Louisiana	
Year	United States (000)	Louisiana	Total	Rate Per 1000 Live	Total	Rate Per 1000 Live
1940	2,559	50,916	89,500	34.9	4,200	82.3
1945	2,858	57,838	117,400	41.1	4,893	84.5
1950	3,632	76,731	141,600	38.9	6,173	84.5
1955	4,104	88,553	183,300	44.6	7.067	79.9
1960	4,258	90,126	224,300	52.7	8,248	91.5
1964	4,027	86,000	275,700	68.5	9,567	111.2
1965	3,767	79,533	N.A.	N.A.	9,493	119.4
1966	N.A.	78,121	N.A.	N.A.	9,700	125.6

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[1]Source: U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966 (87th ed.) pp. 46-49.

[2]Source: La. State Board of Health, Annual Statistical Reports 1940-1967; STATISTICAL ABSTRACT OF LOUISIANA (LSUNO Press 1965).